SUPREME COURT, U. S.
AUG 15 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 256

ORLANDO CEPEDA,
Petitioner,

vs.

COWLES MAGAZINES AND BROADCASTING, INC., a corporation,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

WILLIAM K. COBLENTZ
44 Montgomery St.
San Francisco, California 94104,
Attorney for Respondent

COOPER, WHITE & COOPER
CHARLES W. KENADY
44 Montgomery St.
San Francisco, California 94104,
Of Counsel

August 15, 1968

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Question Presented	1
Statement of Case	2
Argument	7
1. Cepeda Was a Public Figure	7
2. Jury Instructions Were More Favorable to Petitioner Than Required by Constitutional Standards	9
Conclusion	11

TABLE OF AUTHORITIES CITED

Cases	Pages
Curtis Pub. Co. v. Butts, 388 U.S. 130	8, 9, 10
New York Times v. Sullivan, 376 U.S. 254	9
Time, Inc. v. Hill, 385 U.S. 374	9

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 256

ORLANDO CEPEDA,
Petitioner,

vs.

COWLES MAGAZINES AND BROADCASTING, INC., a corporation,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

QUESTION PRESENTED

Is any certiorari question presented in a libel action where plaintiff is a public figure and upon adequate instructions the jury found defendant had not published recklessly?

STATEMENT OF CASE

The opinion of the Court below in summing up the trial which resulted in a verdict for defendant states as follows:

> "The trial was lengthy and the evidence voluminous, ably presented and relevant to the issues. The court instructed the jury three times on the subject of actual malice, including in that term wanton recklessness and heedlessness of the plaintiff's rights. It also included in the concept of malice reckless or heedless failure to check sources of information, or such failure to check, for the purpose of avoiding finding of the truth. This latter instruction would seem to come within the New York Times definition of malice, and therefore be proper. The proposed Harlan test of an extreme departure from ordinary standards of investigation and reporting as a ground for allowing recovery was not and should not have been made the subject of an instruction, since that test had been rejected by a majority of the Supreme Court in Butts.
>
> "The Butts decision cast important obstacles in Cepeda's path. The jury found that he had not overcome those obstacles. The verdict was supported by the evidence, and we affirm the judgment which was entered on the verdict."

To evaluate the correctness of the proceedings below, it will be necessary to summarize the article complained of and the salient portions of the evidence showing the extensive investigation and preparation made by respondent's experienced sports writer before publication.

Look's article (Petition, pp. xii-xx) opened by stating that Cepeda was considered "expendable" by Giant management who were willing to trade him for a "top-notch pitcher." Based on his investigations of the sources outlined hereafter, the author then set out what, in his opinion, were the "counts against" Cepeda, i.e., (1) failure in pro-

ducing crucial hits, (2) not being a "team man," (3) blaming everybody but himself when things went wrong, (4) failing to rebound, and (5) being a hardy holdout every year. The article then suggested that as a result, Cepeda was in "disfavor" with Horace Stoneham, the Giant owner, and was the subject of "front office disenchantment."

The article acknowledged Cepeda's talents as a hard hitting outfielder and reported that other clubs would like to have had him but were afraid the price was too high in terms of money or players demanded in exchange. It noted that the then Giant manager, Alvin Dark, rated his players by a plus and minus system, rating Cepeda as "terribly minus" (a statement, by the way, never challenged by Cepeda), and went on to assert the feeling of the Giant management that Cepeda's clutch performance was unsatisfactory.

The article next suggested that reasons other than personality difficulties might have been to blame for Cepeda's poor playing performance. It noted that he played a great deal of winter ball (continuously for the previous 8 years) which undoubtedly contributed to physical weariness causing a batting slump. The author concluded by opining that it was "not imperative that Cepeda mature sufficiently to approximate a team player", "he could remain primarily the virtuoso of the long ball" and in the words of a Cepeda advisor, if he kept a level head and concentrated on the game, he would become a great player.

At the time of publication, the author of the article, Tim Cohane, had been continuously in the sports writing field since his graduation from Fordham in 1935. He had been Sports Editor of *Look* Magazine since 1944 and in that capacity had written over 350 feature sports articles. Fellow sports writers, Giant executives and the editors of *Look*

Magazine all testified without dispute that he had earned the reputation of an accurate, honorable, skillful and objective sports writer.

After petitioner's rookie year in the major leagues, *Look* Magazine had published an article suggesting his future greatness. In the fall of 1962 Cohane suggested to *Look's* editors that a follow-up story be prepared for probable publication in the summer of 1963 tracing Cepeda's rise as a power hitter since the last article and discussing his promising future. In order to perform the field research for such an article, Cohane visited the San Francisco Giants' spring training camp near Phoenix, Arizona, in February, 1963, and contacted his long-time friend, Garry Schumacher, Public Relations Director and member of the "front office" staff of the San Francisco Giants. Although Cohane knew that Cepeda at the time was a "holdout" for higher pay, he was somewhat surprised to learn from Schumacher that the previous enthusiasm of Giants' management for Cepeda had changed and that Horace Stoneham, owner of the Giants, was "fed up" with him. Schumacher added that Cepeda was a temperamental and moody player who was inclined to sulk, blamed others for his mistakes and did not assimilate instructions quickly (III R. 470:21-471:25; 477:2-21).

In the course of their several conversations in Arizona, Schumacher added (in what Cohane described as "parallel language") that Cepeda "doesn't produce the crucial hit often enough", does not "rebound and take it out on the opposition", and "is not a team man" (III R. 592:9-24).

In view of these comments, Cohane had repeatedly asked Schumacher whether there was a possibility that Cepeda would be traded in preference to meeting his salary demands. Schumacher was non-committal until the last meet-

ing of the two friends when Cohane mentioned the summer date when the story on Cepeda was scheduled to be published in *Look,* and Schumacher remarked "I hope he is with the team". Cohane testified that he regarded this as a friendly hint that the trade was possible, knowing that baseball officials seldom discussed trades with sports writers before making them (III R. 627:23-635:18). In line with this Cohane regarded his talk with Schumacher as "off the record" and for the same reason, as he testified, it would have been fruitless and embarrassing to seek confirmation of his lead from the Giants' owner, Horace Stoneham. This conclusion was confirmed by the testimony of Horace Stoneham at the trial where he agreed that it would be stupid for him or any baseball owner to impart to a sports writer his disfavor of any player on the club (III R. 355:8-16).

Upon leaving the Giants' training camp, Cohane went to the training camp of the Boston Red Sox, also in Arizona, where he met another old friend, Mike Higgins, General Manager of that club. Higgins advised him that Cepeda had been offered in trade for a top flight pitcher and other considerations after the previous baseball season.

The following day Cohane drove to the training camp of the Cleveland Indians to discuss Cepeda with George Tebbetts and Gabe Paul of the Cleveland Indians. Cohane had known Tebbetts, the Indians' Manager, for some 16 years and regarded his friendship with Cleveland owner Gabe Paul as one of his "closer relationships in baseball" (III R. 655:25-656:22). Tebbetts told Cohane that Cepeda had been tradeable for a top-drawer pitcher and a trade was still possible although unlikely. Paul agreed with Tebbetts and when queried about the reasons for the Giants' willingness to trade Cepeda, Paul said, in effect: "You know how Horace is when he gets fed up" (III R. 660:23-662-A:3;

666:17-667:20). The remark of owner Gabe Paul concerning his fellow owner, Horce Stoneham, was important confirmation to Cohane that he was on the track of a story somewhat different than that originally contemplated.

His evaluation of what he had learned was confirmed by other prominent sports writers who testified at the trial and agreed that Horace Stoneham and members of baseball's "front office" would not discuss trades. These witnesses also agreed that club owners and managers who might have been consulted regarding possible trades, were good sources of information (III R. 1676:5-10; 1688:9-16; 1689:25; 1723:10-1724:15).

Upon his return to New York, Cohane consulted with *Look's* editors and the decision was made to recast the previously contemplated picture story as a "text piece" incorporating the information Cohane had obtained in Arizona. Cohane then described to the jury his intensive research in preparation for writing the articles which included review of all of the published material concerning Cepeda's relationship with the San Francisco Giants that had been assembled by *Look's* research staff.

Cohane testified at the trial that his article was based entirely upon his own opinion from his field research and inspection of the research of other trusted and experienced sports writers which substantiated Cohane's opinion that Cepeda was a superior ball player who also had some professional problems and limitations.

As objective confirmation of his conclusions Cohane knew that previous to the 1963 season Cepeda had been offered a new contract at $40,000 or $7,000 less than he had received in the previous season. At the trial it was stated by Giants' executives called as witnesses by petitioner that it was customary to give players on a pennant winning team at

least token raises for the next season and that Cepeda was the only Giant who was offered a 1963 contract reflecting a cut in pay (III R. 1277:15-25).

One of the sports writer witnesses at the trial testified that after this unusual situation had leaked to the press he had telephoned Cepeda who expressed great disappointment and added "makes me wonder if maybe they don't want me anymore" (III R. 1737:3-14).

It was also confirmed at the trial without dispute that during the critical February, 1963, period when Cohane was conducting his field research, the Giants manager, Alvin Dark, in a press conference had characterized Cepeda as "terribly minus" when measured with other members of the team in performance on the field. (III R. 1092:24-1095:14).

Further evidence of Cepeda's own recognition of his disaffection with the Giants was supplied in a newspaper interview given by Cepeda some two months before the trial in which he admitted that he was correctly quoted as stating that: "They said in San Francisco that I didn't care about winning, but I had a bad attitude and wasn't a team player — even when I was doing good***". (III R. 1473:24-1479:16).

Cohane submitted his by-line article to *Look's* editors for review and approval for publication on or about April 5, 1963. As a member of the editorial board testified, the article was viewed as Cohane's opinion based on his "20 years of listening, observing, of learning." (III R. 1836:10-15)

ARGUMENT

1. Cepeda Was a Public Figure.

Although petitioner suggests somewhat obliquely in the closing pages of his brief that he was not a "public figure", the record shows quite clearly the contrary.

The Court below in its first opinion characterized petitioner as "a well known baseball player who in the course of a season, would be under the interested observation of hundreds of fellow players and hundreds of thousands of paying customers***". Judicial notice was taken of the fact that petitioner was one of the ablest and best known members of the San Francisco Giants who had the previous season won the National League Pennant. (Exhibit "A", Petitioner's brief, pages ii-iii).

During the course of the trial petitioner testified to his belief that he enjoyed an international reputation among baseball fans and particularly in his native Puerto Rico and other metropolitan centers where all Spanish speaking fans hailed him as a particular hero (III R. 1364:7-1366; 1453:22-1454:22). Exhibits introduced by respondent during the trial showed that petitioner had been the subject of a laudatory feature article in respondent's magazine, Look, as early as 1959, that during the ensuing 6 years of major league stardom petitioner was the subject of feature articles prepared by syndicated sports columnists for national press distribution as well as picture stories, personality sketches, etc. appearing in *Sports Illustrated* and other like national sports periodicals.

On these facts respectable showing may be made that petitioner by reason of the status that he had achieved would by the test of public identity and interest be considered more famous than Coach Butts of the University of Georgia. For present purposes, it is sufficient to conclude that the undisputed facts support the decision of both Courts below that Cepeda, like Butts, commanded a substantial amount of independent public interest at the time of respondent's publication and would be labelled a "public figure" under ordinary tort rules. *Curtis Pub. Co. v. Butts,* 388 U.S. 130, 154.

One may agree with petitioner's observation that the question of his relationship with his employers and his general "baseball temperament" was of somewhat less than compelling importance when contrasted with the social and political issues confronted by this Court in the *New York Times v. Sullivan,* 376 U.S. 254. However, as this Court has wisely noted and frequently stated, most recently in *Time, Inc. v. Hill,* 385 U.S. 374, 388:

> "****No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression".

The undisputed facts from the record clearly show that the Court below was entirely correct in applying the standards of *Curtis Pub. Co. v. Butts* in its review of the actions of the trial court. Indeed, had the pertinent constitutional safeguards not been enunciated and applied by the Court of Appeals, a constitutional question would have arisen requiring this Court's attention. Since the reverse is true and the constitutional standards were correctly applied, no reason exists justifying a grant of the writ requested by petitioner.

2. Jury Instructions Were More Favorable to Petitioner Than Required by Constitutional Standards.

After thirteen days of trial and the testimony of twenty witnesses (three by deposition) petitioner's case was submitted to the jury under instructions which were, if anything, more favorable to petitioner than instructions framed in the precise terms of the standards set forth in *Butts.* Since the jury's verdict was returned on November 2, 1966,

while the decision of this Court in *Butts* was handed down June 12, 1967, neither counsel nor the trial judge had the benefit of this Court's views.

The instructions, which were framed in the terms of California law rather than the emerging Federal rule, advised the jury that a finding of actual malice was necessary in order to hold the respondent liable. However, they were further instructed that such actual malice need not be "proved directly by showing of evil motive or intent" (IIIR. 2244:6-8). Other indicia of malice included: 1) "wanton recklessness or heedlessness of plaintiff's rights"; 2) "whether or not the article itself shows actual malice"; 3) "a failure adequately to check sources of information" which was "reckless or heedless"; 4) "arbitrary abuse of power"; and 5) lack of good faith and reasonable grounds for belief (III R. 2243:2-8; 2243:18-25; 2244:18-2245:5). While the jury was told that "negligence alone is not the equivalent of nor is it sufficient alone to prove actual malice" —thereby clearly implying that the other factors alone would be sufficient—negligence was not excluded as evidence of malice (III R. 2245:6-10).

Petitioner cannot contend that *Look's* duty of care received too little emphasis in the instructions or that the question of its care was not fully litigated. The record of testimony and exhibits summarized above demonstrates that the question of *Look's* care was of primary importance to both parties and was before the jury throughout the trial. Petitioner's opening statement and closing argument are also replete with references to this issue. (III R. 138:18-155:11; 2022:9-2078:20; 2160:11-2181:9).

The fair comment instruction placed primary emphasis upon the importance of care, with five distinct references to the fact that absence of reasonable grounds for belief, reckless publication and failure to check constitute indicia of

"actual malice" (e.g. III R. 2243:2-3, 5-6, 12-13, 22-23; 2244: 19-22; 2245:1-3). After hearing this instruction three times, the least perceptive juror would have understood that Cepeda could prevail given an adequate showing that there was a reckless disregard of truth or an extreme departure from accepted standards of investigation and reporting.

CONCLUSION

The record shows beyond dispute that Petitioner was a "public figure" within the scope of this Court's decision in *Butts*. After adequate instructions the jury found upon substantial evidence that defendant had not published recklessly. Hence, no reason exists to grant the Petition for Writ of Certiorari.

Respectfully submitted,

WILLIAM K. COBLENTZ
44 Montgomery St.
San Francisco, California 94104
Attorney for Respondent

COOPER, WHITE & COOPER
CHARLES W. KENADY
44 Montgomery St.
San Francisco, California 94104
Of Counsel

August 15, 1968